

Decision **DRAFT DECISION OF ALJ WONG** (Mailed 1/20/2005)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of San Diego Gas & Electric  
Company (U 902-E) for an Order Implementing  
Assembly Bill 265.

Application 00-10-045  
(Filed October 24, 2000)

Application of San Diego Gas & Electric  
Company (U 902-E) for Authority to Implement  
an Electric Rate Surcharge to Manage the Balance  
in the Energy Rate Ceiling Revenue Shortfall  
Account.

Application 01-01-044  
(Filed January 24, 2001)

**OPINION CLOSING REMAINING MATTERS**

**A. Summary**

Today's decision closes all of the remaining matters in the above-captioned proceedings. These matters concern two motions that San Diego Gas & Electric Company (SDG&E) filed on May 22, 2002, and the September 16, 2002 motion for sanctions filed by the Utility Consumers' Action Network (UCAN).

At the Commission meeting of December 17, 2002, the Commission voted not to adopt the draft decision that addressed the two SDG&E's motions. As a result of the Commission's action, and the issuance of Decision (D.) 02-12-064,

this decision determines that the two SDG&E's motions and UCAN's motion are moot.<sup>1</sup>

## **B. Background**

SDG&E's motions and UCAN's motion arose out of the proposed Settlement Agreement which was transmitted to the Commission's General Counsel on May 10, 2002. According to the transmittal letter, the proposed Settlement Agreement would "resolve fully and completely the federal court litigation" in SDG&E v. Loretta Lynch, et al., United States District Court for the Southern District, Case Number 02CV339 BTM (LAB).<sup>2</sup> The transmittal letter also requested that the Commission consider the proposed Settlement Agreement during the Commission meeting of May 16, 2002 in closed session.

On May 16, 2002, an Assigned Commissioner's ruling (ACR) was issued. The ACR directed SDG&E to do the following:

1. No later than Monday, May 20, 2002, San Diego Gas and Electric Company (SDG&E) shall serve a copy of the above-described letter from Sempra Energy and the accompanying proposed Settlement Agreement on parties of record in the captioned proceedings. Copies shall also be served electronically on those parties on the service list that have provided an e-mail address.

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<sup>1</sup> Applications for rehearing of D.02-12-064 were filed by the City of San Diego, the Office of Ratepayer Advocates, and UCAN. Those rehearing applications were denied in D.03-08-072. UCAN then petitioned the Court of Appeal for a writ of review of D.03-08-072, which was granted. On July 12, 2004, the Court of Appeal affirmed D.02-12-064 and D.03-08-072.

<sup>2</sup> In D.02-12-064, the Commission adopted a subsequent version of the proposed Settlement Agreement. The adopted Settlement Agreement was transmitted to the Commission by SDG&E on June 14, 2002.

2. Pursuant to Rules 5, 7, and 7.1 of the Rules of Practice and Procedure (Rules), SDG&E shall file notice(s) of any communication(s) with decisionmakers that concern substantive issues in the captioned proceedings, including issues pertaining to the power procurement contracts that are addressed in the proposed Settlement Agreement, if such communication(s) did not occur in a public hearing, workshop, or other public setting, or on the record.
3. In the event that SDG&E wishes to pursue implementation of the proposed Settlement Agreement or any other settlement regarding issues in this proceeding, it shall do so in accordance with the rules governing stipulations and settlements set forth in Article 13.5 (Rule 51, et seq.) and the Rules.

On May 20, 2002, SDG&E filed and served a response to the ACR. SDG&E complied with Paragraph 1 of the ACR by attaching the May 10, 2002 transmittal letter and the proposed Settlement Agreement to the response. In its response, SDG&E objected to Paragraphs 2 and 3 of the ACR, and stated that it would file a motion for full Commission reconsideration of those Paragraphs, along with a motion for a stay of Paragraph 2.

On May 22, 2002, SDG&E filed the two motions. The first motion sought an immediate stay of the May 16, 2002 ACR directing SDG&E (1) to serve certain documents on the service list, and (2) to file ex parte notices if any communications concerning substantive issues, including issues pertaining to the power procurement contracts addressed in the proposed Settlement Agreement, occurred. The second SDG&E motion requested that the full Commission reconsider the ACR, which directed SDG&E to serve certain documents and to file ex parte notices if such contacts occurred.

Responses to SDG&E's motions were filed on June 3, 2002.

On June 7, 2002, an ACR clarifying the May 16, 2002 ACR was issued. The June 7 ACR stated:

1. The Ruling of May 16, 2002 does not preclude SDG&E from discussing with the Commission's General Counsel's office or proposing resolution of the issues that are the subject of the pending federal court litigation.
2. Nothing in the Ruling of May 16, 2002 shall preclude SDG&E from simultaneously proposing to the Commission, and all parties of the captioned proceeding, resolution of the issues that are the subject of the pending federal court litigation, upon which the parties would be allowed to comment.

The draft decision addressing both of SDG&E's motions was mailed to the parties on June 17, 2002, and was placed on the Commission's meeting agenda for July 17, 2002. The draft decision proposed that SDG&E's motion for an immediate stay be dismissed as moot, and that SDG&E's request to the full Commission to vacate Paragraphs 2 and 3 of the May 16, 2002 ACR be denied, and that the May 16, 2002 ACR as clarified by the June 7, 2002 ACR, be affirmed.

In the meantime, on September 16, 2002, UCAN filed its motion for sanctions. UCAN's motion requests that the Commission impose sanctions on SDG&E for SDG&E's refusal to comply with the May 16, 2002 ACR. UCAN cites Pub. Util. Code § 1733(a) in support of its argument that since the Commission did not stay the May 16, 2002 ACR within 60 days, SDG&E had the obligation to disclose all of the ex parte contacts that it had with decisionmakers in early 2002 regarding the proposed Settlement Agreement. UCAN also contends that this is the second time that SDG&E has defied the Commission. UCAN requests that sanctions be imposed on SDG&E of no less than \$45,000 and up to a maximum of \$1.8 million.

SDG&E filed a response in opposition to UCAN's motion on October 1, 2002. SDG&E contends that Pub. Util. Code § 310 specifies what an "order" of the Commission means, and that the May 16, 2002 ACR was not an order of the Commission. SDG&E also asserts that UCAN's citation to Pub. Util. Code § 1733(a) in support of its motion for sanctions is not applicable because that code section only applies to a rehearing of a Commission decision or order.

At the December 17, 2002 Commission meeting, the Commission considered the June 17, 2002 draft decision, and voted not to adopt the draft decision.

### **C. Discussion**

The June 17, 2002 draft decision addressed the disposition of the two SDG&E's motions. However, at the December 17, 2002 meeting, the Commission voted not to adopt the draft decision.<sup>3</sup> As a result of the Commission's vote, a final disposition of the two SDG&E's motions remains outstanding. In addition, up to today, the Commission has not addressed UCAN's motion for sanctions. UCAN's motion, however, is based on the May 16, 2002 ACR, for which SDG&E sought reconsideration in its May 22, 2002 motion.

In our final disposition of these motions, we must first address the legal effect of our vote not to adopt the June 17, 2002 draft decision. The Bagley-Keene Open Meeting Act defines "action taken" as:

"[A] collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote

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<sup>3</sup> In D.03-08-072 at page 20, we noted that the draft decision issued on June 17, 2002 "was voted down at the Commission's December 17, 2002 meeting."

by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.” (Govt. Code § 11122.)

When we voted on the draft decision at the December 17, 2002 Commission meeting, we were taking action as a collective body on whether to adopt or reject the draft decision. (See 45 CPUC 2d 178, 187-188; 46 CPUC 2d 223, 235.) As a matter of law, we took official action by making a negative decision, i.e., we rejected the draft decision’s proposal that SDG&E’s request to the full Commission to vacate Paragraphs 2 and 3 of the May 16, 2002 ACR be denied, and that the May 16, 2002 ACR as clarified by the June 7, 2002 ACR, be affirmed. The action that we took was reported in the official results of our December 17, 2002 business meeting as follows:

“Outcome Defeated (Upon reconsideration, the item was defeated.)”

At the same December 17, 2002 meeting, we also voted to adopt the proposed Settlement Agreement as part of the Commission’s decision in D.02-12-064. As a result, SDG&E’s motion for an immediate stay is obviously moot.

Due to the passage of time, and the fact that the settlement adopted in D.02-12-064 resolved the underlying issues giving rise to the ACR, SDG&E’s motion to reconsider the ACR is also moot.

With respect to UCAN’s motion for sanctions, that motion must be viewed in the context of the action taken on December 17, 2002. Since we effectively voted not to deny SDG&E’s request to vacate Paragraphs 2 and 3 of the May 16, 2002 ACR, and voted not to affirm the May 16, 2002 ACR, that action has mooted UCAN’s pending motion for sanctions as well.

Since this decision determines that all three motions are moot because of the actions taken by the Commission, there is no need to address the other arguments of SDG&E and UCAN.

Thus, these proceedings should be closed since there are no other outstanding matters for the Commission to address.

#### **D. Comments on Draft Decision**

The draft decision of the assigned administrative law judge (ALJ) was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. SDG&E filed comments in support of the draft decision. No other comments were filed.

#### **E. Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner, and John S. Wong is the assigned ALJ for this portion of these proceedings.

#### **Findings of Fact**

1. SDG&E's motions and UCAN's motion arose out of the proposed Settlement Agreement which was transmitted to the Commission's General Counsel on May 10, 2002.
2. The Commission adopted a subsequent version of the Settlement Agreement in D.02-12-064.
3. On May 16, 2002, the ACR was issued which directed SDG&E to serve a copy of the proposed Settlement Agreement on the parties to this proceeding, to file any ex parte notices on issues pertaining to the power procurement contracts that were addressed in the proposed Settlement Agreement, and if SDG&E was going to pursue the implementation of the proposed Settlement Agreement, that the Commission's stipulation and settlement rules be followed.

4. On May 22, 2002, SDG&E filed a motion for an immediate stay of the May 16, 2002 ACR, and a motion for the full Commission to reconsider the ACR.

5. On June 7, 2002, an ACR clarifying the May 16, 2002 ACR was issued.

6. The draft decision, which addressed both of the SDG&E's motions, was mailed to the parties on June 17, 2002, and placed on the Commission's meeting agenda for consideration.

7. The draft decision proposed that SDG&E's motion for an immediate stay be dismissed as moot, and that SDG&E's request to the full Commission to vacate Paragraphs 2 and 3 of the May 16, 2002 ACR be denied, and that the May 16, 2002 ACR, as clarified by the June 7, 2002 ACR, be affirmed.

8. UCAN's motion for sanctions requests that the Commission impose sanctions on SDG&E for SDG&E's refusal to comply with the May 16, 2002 ACR.

9. At the December 17, 2002 Commission meeting, the Commission considered the June 17, 2002 draft decision, and voted not to adopt the draft decision.

10. The only remaining issues in this proceeding are the two motions of SDG&E, and UCAN's motion for sanctions.

11. Until today's decision, the Commission has not addressed UCAN's motion for sanctions.

12. UCAN's motion for sanctions is based on the May 16, 2002 ACR, for which SDG&E sought reconsideration in its May 22, 2002 motion.

13. The Commission's action on the draft decision was reported in the official results of the Commission's December 17, 2002 business meeting.

14. At the same December 17, 2002 Commission meeting, the Commission also voted to adopt the proposed Settlement Agreement as part of the Commission's decision in D.02-12-064.



15. UCAN's motion for sanctions must be viewed in the context of the action taken on December 17, 2002.

**Conclusions of Law**

1. Since the Commission voted not to adopt the June 17, 2002 draft decision, a final disposition of the two SDG&E's motions remains outstanding.

2. By voting not to adopt the June 17, 2002 draft decision, the Commission made a negative decision.

3. The negative decision rejected the draft decision's proposal that SDG&E's request to the full Commission to vacate Paragraphs 2 and 3 of the May 16, 2002 ACR be denied, and that the May 16, 2002 ACR as clarified by the June 7, 2002 ACR, be affirmed.

4. As a result of D.02-12-064, SDG&E's motion for an immediate stay is moot.

5. Since the Commission did not adopt the outcome that was proposed in the June 17, 2002 draft decision at the December 17, 2002 meeting, and due to the fact that the settlement adopted in D.02-12-064 resolved the underlying issues giving rise to the ACR, SDG&E's motion for the Commission to reconsider the May 16, 2002 ACR, and UCAN's motion for sanctions for SDG&E's alleged violation of the May 16, 2002 ACR, are moot.

6. These proceedings should be closed since there are no other outstanding matters for the Commission to address.

**O R D E R**

1. As a result of the Commission's vote at the December 17, 2002 Commission meeting on the June 17, 2002 draft decision, which addressed the May 22, 2002 motion of San Diego Gas & Electric Company (SDG&E) for an immediate stay of the May 16, 2002 Assigned Commissioner's ruling (ACR) and the May 22, 2002

motion of SDG&E for the full Commission to reconsider the May 16, 2002 ACR, and the Commission's adoption of Decision 02-12-064, the two SDG&E's motions that were filed on May 22, 2002 are moot.

2. As a result of the Commission's vote at the December 17, 2002 Commission meeting on the June 17, 2002 draft decision, and because the September 16, 2002 motion for sanctions filed by the Utility Consumers' Action Network (UCAN) is based on the May 16, 2002 ACR, UCAN's motion for sanctions is moot.

3. Application (A.) 00-10-045 and A.01-01-044 are closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.